No. 06154 2007

IN THE

Supreme Court of the United States

CHARLES A. NICHOLS,
Petitioner,

v.

BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the Colorado Court of Appeals

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether it was error for the court below, in conflict with the Federal Employers' Liability Act ("FELA"), decisions of this Court construing the Act, and other federal and state court decisions, to affirm the trial court's reduction of the jury's award of damages caused by the railroad's negligence based on answers apportioning between petitioner's "condition" and a "pre-existing condition"?

LIST OF PARTIES

Pursuant to Supreme Court Rule 14.1, petitioner states that the parties listed in the caption are the only parties to the proceedings in the court below whose judgment is sought to be reviewed.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	vi
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
I. FELA: Statutory Enactment, Purpose, and This Court's Stewardship	3
II. Factual Background and Procedure Below	7
REASONS FOR GRANTING THE PETITION	11
I. THE COURT BELOW MADE NO ATTEMPT TO RECONCILE THE JURY'S ANSWER TO QUESTION 8 WITH ITS AWARD OF DAMAGES CONTRARY TO RULING DECISIONS OF THIS COURT	12
II. FELA PERMITS A COURT'S REDUCTION OF A JURY'S DAMAGE AWARD BASED ONLY ON ONE APPORTIONMENT—FOR COMPARATIVE NEGLIGENCE OF THE EMPLOYEE	18
III. THE DECISION BELOW CONFLICTS WITH OTHER STATE COURTS ON THE USE OF AND EFFECT TO BE GIVEN SPECIAL INTERROGATORIES ADDRESSING PRE-EXISTING CONDITIONS IN FELA ACTIONS	21

TABLE OF CONTENTS—Continued

	Page
CONCLUSION	24
APPENDIX A	
Denver District Court Order of Judgment	1a
APPENDIX B	
Colorado Court of Appeals Opinion	7a
APPENDIX C	
Colorado Court of Appeals Order Denying Petition for Rehearing and Modifications to Opinion	17a
APPENDIX D	
Colorado Supreme Court Order Denying Petition and Cross-Petition for Writ of Certiorari	20a
APPENDIX E	
Federal Employers' Liability Act, 45 U.S.C. §§ 51 to 54 ("FELA")	22a
APPENDIX F	
Transcript Excerpt of Instructions Hearing from Denver District Court	25a
APPENDIX G	
Plaintiff's Motion for Entry of Judgment in Denver District Court	31a
APPENDIX H	
Denver District Court's Instructions to the Jury	40a
APPENDIX I	
Sauer v. Burlington Northern R.R. Co., Special Verdict Form One	57a

TABLE OF CONTENTS—Continued

Page

APPENDIX J

Petitioner's Notice of Appeal to Colorado Court Of Appeals 59a

APPENDIX K

Petitioner's Amended Petition for Rehearing to Colorado Court of Appeals 65a

APPENDIX L

Petitioner's Petition for Writ of Certiorari to Colorado Supreme Court 72a

TABLE OF AUTHORITIES

CASES Page

Aetna Indem. Co. v. J.R. Crowe Coal & Mining Co., 154 F. 545 (8th Cir. 1907) 16
American Ry. Express Co. v. Crabtree, 271 F. 287 (6th Cir. 1921) 16
Atlantic & Gulf Stevedores, Inc., v. Ellerman Lines, Ltd., 369 U.S. 355 (1962) 6, 12, 14
Bailey v. Central Vermont Ry., 319 U.S. 350 (1943) 5, 13
Baker v. Baltimore & Ohio R. Co., 502 F.2d 638 (6th Cir. 1974) 4, 20
Brady v. Southern Ry. Co., 320 U.S. 476 (1943)... 4
Chesapeake & Ohio R. Co. v. Stapleton, 279 U.S. 587 (1929) 4
Consolidated Rail Corp. v. Gottshall, 512 U.S. 532 (1994) 3
Cummings v. Ill. Cent. R. Co., 269 S.W.2d 111 (Mo. 1954) 6
Davis v. Baltimore & Ohio R.R. Co., 379 U.S. 671 (1965) 6, 12
Davis v. Wechsler, 263 U.S. 22 (1923) 5
Dice v. Akron, Canton, & Youngstown R.R., 342 U.S. 359 (1952) 4, 12, 22
Eggert v. Norfolk & W. Ry. Co., 538 F.2d 509 (1976) 5
Escher v. Norfolk and W. Ry. Co., 397 N.E.2d 9 (Ill. App. 1979), aff'd, 411 N.E.2d 864 (1980).. 5
Gallick v. Baltimore & Ohio R. Co., 372 U.S. 108 (1963) 12-15
Green v. River Terminal Ry. Co., 763 F.2d 805 (6th Cir. 1985) 4, 20
Gregory v. Morris, 96 U.S. 619 (1877) 16
Hager v. Norfolk & Western R. Co., 2006 WL 3634373 (Ohio 2006) 17, 23

TABLE OF AUTHORITIES—Continued

Page

Harper & Reynolds Co. v. Wilgus, 56 F. 587 (9th Cir. 1893) 16

Hickson Corp. v. Norfolk So. Ry. Co., 260 F.3d 559 (6th Cir. 2001) 17, 18

Hoepfner v. Northern Pac. Ry. Co., 61 F. Supp. 819 (D. Mont. 1945) 4

H.T. Arnold v. Panhandle & Santa Fe Ry. Co., 353 U.S. 360 (1957) 5, 6, 12, 14

Lavender v. Kurn, 327 U.S. 645 (1946) 12

McVey v. Phillips Petroleum Co., 288 F.2d 53 (5th Cir. 1961) 14

Metcalfe v. Atchison, T. & S.F. Ry. Co., 91 F.2d 892 (10th Cir. 1974) 6

Morris v. Pennsylvania R. Co., 187 F.2d 837 (2d Cir. 1951) 14

Nichols v. Burlington No. & Santa Fe Ry. Co., 56 P.3d 106 (Colo. App. 2002) 7

Nichols v. Burlington No. & Santa Fe Ry. Co., 148 P.3d 212 (Colo. App. 2006) 2, 10, 11, 16

Norfolk & W. Ry. v. Liepelt, 44 U.S. 490 (1980) ... 4

Norfolk & Western R. Co. v. Ayers, 538 U.S. 135 (2003) 6, 18-21

Norfolk Southern R. Co. v. Bradley, 772 So. 2d 1147 (Ala. 2000) 18, 22

Pomroy v. Bangor & Aroostook R. Co., 67 A. 561 (Me. 1907) 20

Rogers v. Missouri Pacific R. R. Co., 352 U.S. 500 (1957) 5, 12, 13

Sauer v. Burlington No. R. Co., 106 F.3d 1490 (10th Cir. 1996) 10, 20, 21

Schulz v. Pennsylvania Rd. Co., 350 U.S. 523 (1956) 12

Second Employers' Liability Cases, 223 U.S. 1 (1912) 3, 4

TABLE OF AUTHORITIES—Continued

Page

Southern Pac. Co. v. Smith, 83 F.2d 451 (9th Cir. 1936) 16
St. Louis Southwestern Ry. Co. v. Dickerson, 470 U.S. 409 (1985) 4
Tennant v. Peoria & P.U. Ry. Co., 321 U.S. 29 (1944) 6, 12
Texas & Pacific Ry. Co. v. Roberts, 481 S.W.2d 798 (Tex. 1972) 6
Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54 (1943) 3, 13
Urie v. Thomson, 337 U.S. 163 (1949) 4
Wilkerson v. McCarthy, 336 U.S. 53 (1949) 5, 12
Worthy v. Norfolk and Western Ry. Co., 619 N.E.2d 1371 (Ill. App. 1993) 18, 22

CONSTITUTION & STATUTES

U.S. Const. art. VI, cl. 2 4
U.S. Const. amend. VII 2, 3, 11, 12
28 U.S.C. § 1257(a) 2
Federal Employers' Liability Act, 45 U.S.C. § 51, *et seq.* 2-4

OTHER

Jacob A. Stein, *Stein on Personal Injury Damages*, § 11:15 (3rd ed. 2007) 23
Sheila K. Hyatt and Stephen A. Hess, *Rule 59. Motions for Post-Trial Relief*, 5 Colorado Practice Series, Civil Rules Annotated, R 59 (4th ed., West's 2006) 23

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Charles A. Nichols, prays that the Supreme Court grant a writ of certiorari to review the judgment of the Colorado Court of Appeals affirming the trial court's use, in a FELA case seeking damages for aggravation of latent pre-existing conditions, of a special verdict form containing questions regarding petitioner's asymptomatic pre-existing conditions. After reducing the jury's award of damages to reflect the jury's finding of comparative negligence, the trial court reduced the jury's general damage award—already accounting for pre-existing conditions as mandated by the court's jury instructions—a second time based on the answers to those questions.

OPINIONS BELOW

The opinion of the Colorado Court of Appeals is reported at 148 P.3d 212 and reproduced as Appendix B. The entry of judgment of the Denver County District Court is not reported, and is reproduced as Appendix A.

JURISDICTION

The judgment of the Colorado Court of Appeals as to which review is sought entered on March 23, 2006. The Court of Appeals denied a timely petition for rehearing on May 25, 2006. On December 18, 2006, the Colorado Supreme Court denied a timely petition for writ of certiorari, making the Court of Appeals' decision the final state court judgment. On February 13, 2007, Justice Breyer extended the time for filing this petition to and including May 17, 2007. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Federal Employers' Liability Act, 45 U.S.C. § 51, *et seq.* ("FELA"), are reproduced at Appendix E.

The Seventh Amendment to the United States Constitution provides in pertinent part: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend. VII.

STATEMENT OF THE CASE

The decision below decided an important question of federal law involving the administration of FELA injury claims in a manner flatly contrary to prior decisions of this

Court, resulting in a violation of petitioner's Seventh Amendment right to trial by jury and disunity in the federal common law of FELA that will lead to unequal treatment of injured workers depending on where a claim is brought. The question raised by the decision below should be settled by this Court to assure the Act's continuing authority in all courts and the uniformity of governing law.

I. FELA: Statutory Enactment, Purpose, and This Court's Stewardship.

In response to mounting concern about the number and severity of injuries suffered by railroad employees, Congress preempted state tort remedies by enactment of FELA in 1908 to provide a compensation scheme for railroad employee workplace injuries. *Second Employers' Liability Cases*, 223 U.S. 1, 53-55 (1912). Unlike typical workers' compensation schemes, which provide relief without regard to fault, Section 1 of FELA provides a statutory cause of action sounding in negligence: "[E]very common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier. . . ." 45 U.S.C. § 51, Appendix E at 22a.

Congress designed FELA to "shif[t] part of the 'human overhead' of doing business from employees to their employers." *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 542 (1994) (quoting *Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54, 58 (1943)). "[T]o further [the Act's] humanitarian purposes, Congress did away with several common-law tort defenses that had effectively barred recovery by injured workers." *Gottshall*, 512 U.S. at 542. FELA "abolished the fellow servant rule," "rejected the doctrine of contributory negligence in favor of . . . comparative negligence," "prohibited employers from exempting themselves from [the] FELA through contract," and, in a 1939 amend-

ment, "abolished the assumption of risk defense." *Id.* at 542-543; *see* 45 U.S.C. §§ 51-55.

FELA Section 56 provides for concurrent jurisdiction between state and federal courts, but FELA actions are governed, substantively, by federal law. *See Chesapeake & Ohio R. Co. v. Stapleton*, 279 U.S. 587, 590 (1929). Governing law is given "uniform application throughout the country essential to effectuate [FELA's] purpose," *Dice v. Akron, Canton, & Youngstown R.R.*, 342 U.S. 359, 361 (1952), superseding the liability as determined by the several states. *See Second Employers' Liability Cases*, 223 U.S. 1, 54 (1912). The supremacy clause of Art. VI of the Constitution charges this Court "with assuring the act's authority in state courts." *Brady v. Southern Ry. Co.*, 320 U.S. 476, 479 (1943).

Absent express statutory departures from the common law, the requisite negligence under FELA is founded on the common law concepts of negligence "as established and applied in the federal courts." *Urie v. Thomson*, 337 U.S. 163, 174 (1949) (citation omitted). "It has long been settled that questions concerning the measure of damages in a FELA action are federal in character," *Norfolk & W. Ry. V. Liepelt*, 444 U.S. 490, 493 (1980), and "the propriety of jury instructions concerning the measure of damages in a FELA action is an issue of 'substance' determined by federal law." *St. Louis Southwestern Ry. Co. v. Dickerson*, 470 U.S. 409, 411 (1985).

FELA is remedial and should be construed so as to advance the remedy given by Congress rather than to narrow it. *See Hoepfner v. Northern Pac. Ry. Co.*, 61 F.Supp. 819, 822 (D. Mont. 1945). The Act is liberally construed in favor of injured railway workers, *see Green v. River Terminal Ry. Co.*, 763 F.2d 805, 806 (6th Cir. 1985), and this purpose must be kept in mind when confronting arguments which would restrict an employer's liability. *See Baker v. Baltimore & Ohio R. Co.*, 502 F.2d 638, 641 (6th Cir. 1974). FELA's

provisions are to be interpreted consistent with the principle that they impose a greater duty on the carrier to respond in damages for injuries than the common law they supplant. *See Rogers v. Missouri Pacific R. R. Co.*, 352 U.S. 500, 506-507 (1957); *Escher v. Norfolk and W. Ry. Co.*, 397 N.E.2d 9, 12 (Ill. App. 1979), *aff'd*, 411 N.E.2d 864 (1980). The Act affords the jury, as fact finder, greater leeway in determining the fact and extent of liability. *See Rogers*, 352 U.S. at 508-509; *Eggert v. Norfolk & W. Ry. Co.*, 538 F.2d 509, 511 (2d Cir. 1976); *Escher*, 397 N.E.2d at 12.

Historically, this Court has jealously guarded FELA's remedial intent. *See H.T. Arnold v. Panhandle & Santa Fe Ry. Co.*, 353 U.S. 360, 361 (1957) ("The petitioner having asserted federal rights governed by federal law, it is our duty under the Act to make certain that they are fully protected, as the Congress intended them to be. We therefore cannot accept interpretations that nullify their effectiveness, for '* * * the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.'") (citing *Davis v. Wechsler*, 263 U.S. 22, 24 (1923)).

Time and again this Court has directed that courts may not invade the province of the jury by substituting their view of the facts in FELA cases for that of the jury, and has repeatedly granted certiorari review "because of the importance of preserving for litigants in FELA cases their right to a jury trial . . . ." *Wilkerson v. McCarthy*, 366 U.S. 53, 55 (1949) (collecting cases). In *Bailey v. Central Vermont Ry.*, 319 U.S. 350, 354 (1943), the Court stated:

> [The right to trial by jury] is *part and parcel of the remedy afforded railroad workers under the Employers' Liability Act.* [H]owever inefficient and backward it may be, it is the system which Congress has provided. To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them.

(emphasis added).

In *Tennant v. Peoria & P.U. Ry. Co.*, 321 U.S. 29, 35 (1944), for example, this Court restored a verdict set aside for lack of evidence on the issue of causation, stating that "[i]t is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. . . . It is the jury, not the court, which is the fact-finding body. . . . That conclusion, whether it relates to negligence, causation *or any other factual matter*, cannot be ignored." (internal citations omitted; emphasis added). *See also Davis v. Baltimore & Ohio R.R. Co.*, 379 U.S. 671 (1965); *Atlantic & Gulf Stevedores, Inc., v. Ellerman Lines, Ltd.*, 369 U.S. 355 (1962); *H.T. Arnold*, 353 U.S. at 361 (rejecting claimed conflict between jury answers and verdict, stating that interpretations of evidence in the name of local practice that nullify federal rights cannot be accepted).

"[T]rial by jury is part of the [FELA] remedy." *Atlantic & Gulf Stevedores, Inc.*, 369 U.S. at 360. FELA vests the jury with complete discretion on the factual issue of liability. *See Texas & Pacific Ry. Co. v. Roberts*, 481 S.W.2d 798, 800 (Tex. 1972); *Cummings v. Ill. Cent. R. Co.*, 269 S.W.2d 111, 116 (Mo. 1954). Absent an award so excessive or inadequate as to shock judicial conscience and raise an irresistible inference that passion, prejudice, corruption or other improper cause invaded the trial, a jury's fact determination of damages is inviolate. *See Metcalfe v. Atchison, T. & S.F. Ry. Co.*, 491 F.2d 892, 898 (10th Cir. 1974).

More recently, in *Norfolk & Western R. Co. v. Ayers*, 538 U.S. 135 (2003), this Court once again underscored FELA's "overall recovery facilitating thrust" in forbidding courts from impinging on the province of the jury by apportioning damages to non-party, non-railroad causes without "textual warrant" in the Act. In doing so, the Court noted that "the Act expressly directs apportionment of responsibility between

employer and employee based on comparative fault. The statute expressly prescribes no other apportionment." *Id.* at 161.

II. Factual Background and Procedure Below.

In November 1999, petitioner Charles A. Nichols (plaintiff below), a Colorado resident and locomotive engineer employee of the Burlington Northern and Santa Fe Railway Company ("BNSF"), fell 10 feet to the road bed while attempting to board a locomotive for a work assignment and sustained permanent and totally disabling injuries to his lower back and right knee in aggravation of later-discovered pre-existing, but asymptomatic, conditions in those areas of his body.

In June 2000, petitioner, whose injuries occurred in Colorado, brought this FELA action against BNSF in state court, asserting claims for negligent work assignment based on the November 1999 accident and a claim for unrelated cumulative injuries to his upper back and neck.

In June 2001, on the eve of a scheduled jury trial, the trial court granted BNSF's motion for summary judgment, dismissing petitioner's claims as time-barred by FELA's three-year statute of limitations. Petitioner appealed, and on August 1, 2002, the Colorado Court of Appeals reversed the judgment of dismissal and remanded the case for trial on the merits. *Nichols v. Burlington No. & Santa Fe Ry. Co.*, 56 P.3d 106 (Colo. App. 2002).[1]

On September 15, 2003, petitioner's FELA claim for negligent work assignment proceeded to trial by jury.[2] At the conclusion of a four-day trial, the parties stipulated to all

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[1] Petitioner has not reproduced this opinion in the Appendix because the issues presented in that appeal have no bearing on this proceeding.

[2] Petitioner's cumulative injury claim, separate from the claim at issue here, settled prior to trial.

instructions to be given. There is no issue in this case as to whether the jury instructions given accurately stated the law. Those instructions directed the jury to find damages only for injuries sustained in the November 1999 accident *caused by the railroad's negligence*, exclusive of any amount for a "pre-existing condition" not caused by the railroad. Appendix H at 41a-42a, 50a, 52a, 54a-55a (Instructions 5, 24, 28, & 33).

The parties did, however, disagree as to what interrogatories FELA law permitted to be asked in the special verdict form. Petitioner objected to the inclusion in the form of any special interrogatories concerning pre-existing conditions or mitigation of damages and to the wording of the form tendered by BNSF on the ground that, while the jury may account for pre-existing conditions in reaching the general damages verdict in a FELA case, asking for a percentage allocation of such conditions in a special interrogatory and the court's reduction of a general verdict based on the jury's response would be error. Appendix F at 28a.

Over petitioner's objections, the trial court decided to use defendant's Special Verdict Form B. Appendix A at 4a-6a. In answer to Questions 1-5 of the form, the jury found causative negligence on the part of both parties, and assessed 70% to BNSF and 30% to petitioner. Question 6 then asked for the only damage calculation performed by the jury.

> 6. [W]hat amount do you find, without any reduction for any negligence which you may find on the Plaintiff's part, will fairly and adequately compensate the Plaintiff for the injury?
>
> ANSWER: $800,000

Appendix A at 5a. Following the jury's findings on the ultimate fact issues of liability and damages, the verdict form continued with the questions objected to by petitioner in the instruction hearing, answered by the jury as follows:

7. [I]s all or part of Plaintiff's *condition* attributable to *a pre-existing condition*?

ANSWER: Yes (Yes or No)

8. [W]hat percentage of Plaintiff's *condition* is attributable to a *pre-existing condition*?

ANSWER: 70%

9. Did Plaintiff fail to mitigate his *damages*?

ANSWER: No (Yes or No)

10. [W]hat amount of . . . *damages* expressed in dollars *as determined in response to Question No. 6* do you find could have been avoided . . . had [Plaintiff] taken reasonable steps to mitigate his *damages*?

ANSWER: $___ (line left blank)

Appendix A at 5a-6a (emphasis added).[3]

After receipt of the verdict and discharge of the jury, petitioner orally requested that judgment enter in the amount of $560,000 (the total damages awarded reduced by the 30% comparative negligence finding). The trial court declined to enter judgment at that time and directed the parties to submit briefs on the issue of whether the jury's award should be reduced only once by the 30% comparative negligence finding or yet again by the 70% answer to Question 8.[4] In his Motion for Entry of Judgment and brief (Appendix G), Petitioner objected to any reduction of the jury's award other than for comparative negligence.

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[3] While inclusion of Questions 9 and 10 in the verdict form was clearly error, the jury's "No" answer to Question 9 mooted this error for lack of prejudice. Counsel for petitioner have found no case, pattern jury instruction, or verdict form suggesting that damages should be apportioned for a plaintiff's failure to mitigate in this manner.

[4] The trial court's call for briefing on the effect of the jury's answers to Questions 7 and 8 indicates uncertainty in the court's mind as to why the questions were asked in the first instance.

After considering the briefs, the trial court issued its order on September 22, 2003 denying plaintiff's motion for entry of judgment. Appendix A. After reducing the damage award by 30% for comparative negligence, the court reduced that net amount again by the 70% answer to special verdict form Question 8. Appendix A at 3a. Relying on *Sauer v. Burlington No. R. Co.*, 106 F.3d 1490 (10th Cir. 1996), the court concluded that not to reduce the award again based on the answer to Question 8 would ignore the jury's "complete findings." Appendix A at 2a. Judgment entered on the jury's $800,000 verdict in the twice-reduced amount of $168,000.[5] Petitioner appealed, seeking entry of judgment in the amount of $560,000. Appendix J.

Though recognizing that the special verdict form and jury instructions viewed in combination were "not models for future use," the Court of Appeals concluded that the reduction of damages based on Questions 7 and 8 was not error. Appendix B at 14a. In what it termed an attempt to "reconcile" the jury's answers based on the record and the instructions, the court concluded that "the jury's finding that $800,000 would fairly compensate the engineer for his injuries did not include any offset for the engineer's negligence or for pre-existing conditions." Appendix B at 15a. The court based this conclusion on the placement of the pre-existing apportionment question after the total damage question and on the notion that two negatives make a positive—that Question 6 did not instruct the jury not to reduce for a "pre-existing condition." *Id.* Based on these considerations, the court rejected an interpretation that the $800,000 number represented damages caused only by the railroad's negligence, already reduced by amounts, if any, attributable to pre-existing conditions, reasoning that if such

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[5] The actual amount of final judgment was $164,950.86, reflecting an undisputed credit to BNSF. For simplicity of reference, petitioner refers only to the $168,000 round number without deduction by the offset.

were the case, the jury's assessment of total damages (before reduction for pre-existing or comparative negligence findings) must have been $2.5 million, an amount that the court found the record could not sustain.[6] Appendix B at 16a. The court concluded that "the jury did not adjust the compensation amount reflected in the response to question six based on its determination of the relative effect of pre-existing conditions and the railroad's negligence." *Id.*

Petitioner's Motion for Rehearing was denied. Appendix C. Petitioner sought certiorari review of the decision in the Colorado Supreme Court, which request was denied. Appendix D. The federal character of these issues was raised in the trial court, the Court of Appeals, and the Colorado Supreme Court. *See* Appendix D, F, G, J, K, & L.

REASONS FOR GRANTING THE PETITION

The decision as to which review is sought decided important questions of federal law in a manner that deprived petitioner of his Seventh Amendment right to trial by jury in a FELA case in conflict with a long line of governing decisions of this Court construing the Act. This Court has repeatedly declared that FELA's remedial intent and the right of injured workers to trial by jury do not permit a seeming conflict in jury findings to deprive a FELA verdict winner of a damages award if those findings are susceptible to any possible view that reconciles them. *Nichols* evidences a troubling disregard of these repeated mandates. This important question of federal law has not been, but should be, settled by this Court in continued exercise of its stewardship of FELA claims.

Further, the decision below has created a conflict with decisions of other state courts that have been called upon to address the propriety of including questions in special ver-

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[6] The record in this case will show that the Court of Appeals' finding of fact on this point is incorrect. *See* Appendix K (petition for rehearing).

dict forms asking for specific findings regarding pre-existing conditions. The decision, a published opinion as to which certiorari review was denied by Colorado's highest court, will inevitably find currency and drive up the transaction costs of every FELA case for employees, employers, and federal and state judicial systems alike by forcing trial and appellate courts to wrestle with this issue in FELA cases involving pre-existing conditions.

Review is necessary to assure FELA's "uniform application throughout the country essential to effectuate its purposes." *Dice*, 342 U.S. at 361. The decision for which review is sought will result in inconsistent treatment of injured employees depending upon the jurisdiction in which their cases happen to be tried. As discussed below, a FELA plaintiff in another state, postured identically to petitioner in this case, would have received a $560,000 award, while Mr. Nichols received only $168,000. Such result defeats the core purpose of FELA—to create a consistent body of federal law to govern injury actions by railroad workers against their employers.

I. THE COURT BELOW MADE NO ATTEMPT TO RECONCILE THE JURY'S ANSWER TO QUESTION 8 WITH ITS AWARD OF DAMAGES CONTRARY TO RULING DECISIONS OF THIS COURT.

Over many decades, this Court has jealously guarded injured railroad employees' right to trial by jury by repeatedly holding that courts may not, consistent with the Seventh Amendment, impinge on the jury's role in the trial of FELA actions. *See, e.g.*, *Davis*, 379 U.S. 671; *Gallick v. Baltimore & Ohio R. Co.*, 372 U.S. 108 (1963); *Atlantic & Gulf Stevedores, Inc.*, 369 U.S. 355; *H.T. Arnold*, 353 U.S. 360; *Rogers*, 352 U.S. 500; *Schulz v. Pennsylvania Rd. Co.*, 350 U.S. 523 (1956); *Wilkerson*, 336 U.S. 53 (collecting cases); *Lavender v. Kurn*, 327 U.S. 645 (1946); *Tennant*, 321

U.S. 29; *Bailey*, 319 U.S. 350; *Tiller*, 318 U.S. 54. The *Rogers* Court stated this imperative well in these words:

> Cognizant of the duty to effectuate the intention of the Congress to secure the right to a jury determination, this Court is vigilant to exercise its power of review in any case where it appears that the litigants have been improperly deprived of that determination. Some say the Act has shortcomings and would prefer a workmen's compensation scheme. The fact that Congress has not seen fit to substitute that scheme cannot relieve this Court of its obligation to effectuate the present congressional intention *by granting certiorari to correct instances of improper administration of the Act* and to prevent its erosion by narrow and niggardly construction.
>
> * * *
>
> *Special and important reasons for the grant of certiorari in these cases are certainly present when lower federal and state courts persistently deprive litigants of the right to a jury determination.*

Rogers, 352 U.S. at 509-510 (emphasis added).

Particularly instructive in this proceeding is *Gallick*, 372 U.S. 108, in which the Court explicated the analytical procedure that courts must follow when faced with a perceived inconsistency between the jury's answers to special interrogatories and a jury's verdict on liability and damages.

Petitioner in *Gallick*, a spotting crew foreman, was bitten by an insect while working on a stretch of railroad right-of-way near a stagnant pool of water, the existence of which the railroad had been aware for many years. *Id.* at 110. Infection developed from the bite. *Id.* Resistant to medical treatment, the infection worsened over time resulting in severe injuries to the foreman. *Id.* Following trial, answering some 24 questions submitted under a state special verdict statute, the jury found in favor of the foreman on liability and damages, and the trial court entered judgment on the verdict. *Id.* at 112.

The railroad appealed, and the Ohio Court of Appeals set aside the judgment based on its conclusion that there was a failure of sufficient proof as to causation. *Id.* at 112-113.

This Court granted certiorari "to consider the question whether the decision below improperly invaded the jury's function." *Id.* at 109. Concluding that it did, the Court reversed the decision, and in addressing the railroad's alternative ground for error—that the jury's responses to interrogatories regarding the railroad's ability to foresee the harm were fatally inconsistent with the general verdict—stressed that it is the duty of "courts to attempt to harmonize the answers, if it is possible under a fair reading of them. . . ." *Id.* at 119. The Court explained that courts must apply proper analysis when faced with an apparent inconsistency between the jury's ultimate findings of liability and damages and answers to special interrogatories:

> "Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way." *Atlantic & Gulf Stevedores, Inc., v. Ellerman Lines, Ltd.*, 369 U.S. 355, 364, 82 S.Ct. 780, 786, 7 L.Ed.2d 798. *We therefore must attempt to reconcile the jury's findings*, ***by exegesis if necessary***, as in *Arnold v. Panhandle & S.F.R. Co.*, 353 U.S. 360, 77 S.Ct. 840, 1 L.Ed.2d 889; *McVey v. Phillips Petroleum Co.*, 288 F.2d 53 (C.A.5th Cir.); *Morris v. Pennsylvania R. Co.*, 187 F.2d 837 (C.A.2d Cir.) (collecting authorities), *before we are free to disregard the jury's special verdict* and remand the case for a new trial.

Id. (emphasis added). In an effort to reconcile the jury's answers with the verdict, the Court examined them in light of the instructions and verdict form questions as a whole and found them susceptible to an interpretation that avoided any inconsistency. *Id.* at 121.

The *Gallick* jury answered "No" to Question 20, which asked if the railroad had any reason to anticipate that the

stagnant pool would result in a "mishap" or an "injury" and also answered "No" to Question 22, which asked, in essence, if the causal relationship between the stagnant pond and the bite was reasonably foreseeable by the railroad. *Id.* at 119.

Looking to the precise wording of the instructions and the questions, the Court observed that the trial court's instructions "more than once . . . separated an 'insect bite' from 'injury,' 'infection,' 'illness' or 'disease.'" *Id.* at 120. Given this use of different terms, the Court concluded that the jury "might not have equated a foreseeable *insect bite* with a *mishap* or *injury*" and may have interpreted the answers simply to mean "that while an insect bite was foreseeable, there was no reason to anticipate a 'mishap' or 'injury' from such a bite." *Id.* (emphasis added). "Looking at No. 20 in the context of the charge and the total context of the special verdict, we cannot assign it sufficient weight to warrant overturning the judgment of the trial court entered pursuant to the jury's special verdict." *Id.* (citations omitted). The Court drew the same conclusion as to Question 22. *Id.*

The Court went on to identify a second reason why the answers did not warrant overturning the judgment. Given that a negligent actor need not foresee the particular damages that occurred to be held liable, the answers were found consistent with the result because they may have simply reflected "far too narrow a concept of foreseeable harm to negative negligence under. . ." FELA, allowing the appellate court to put them aside as "immaterial." *Id.* at 121. Concluding that there was no inconsistency that made the negative responses material to the outcome, the Court reversed the Ohio's appellate court's decision and remanded with directions. *Id.*

In stark contrast, the courts below *created* a perceived inconsistency by allowing the pre-existing condition questions to be asked in the first instance. Contrary to *Gallick*'s mandate, once faced with the perceived inconsistency, the

lower courts made no effort to seek a reconciling interpretation of the answers. To the contrary, they simply assumed that the jurors understood, despite the precise language of the instructions and the questions asked, that their responses bore directly on the question of damages. But, examining the precise words used per *Gallick's* example, it can only be concluded that the jury's answer to Question 6, contrary to the decision below, *did* "adjust the compensation amount . . . based on its determination of the relative effect of pre-existing conditions and the railroad's negligence." *Nichols*, 148 P.3d at 217, Appendix B at 16a. *See* Appendix H at 52a (Instruction 28). The differing terms employed in the instructions and the verdict questions could and should have led the courts below to a reconciling interpretation such as that reached by the *Gallick* Court. Interpreted according to its plain terms, it cannot be concluded that the jury considered Question 8 as asking for a response pertaining to "injuries" or "damages," given the question's reference only to "condition" and "pre-existing condition." Appendix A at 6a.

Neither the instructions nor the verdict form informed the jury that its answers to Questions 7 and 8 would result in a second reduction of its damage award. In contrast, the instructions *did* inform the jury that its answer to the comparative negligence question, Appendix H at 50a (Instruction 24), would reduce the general damage award provided in response to Question 6.

Further, courts must assume that the jury followed the instructions given. *See Gregory v. Morris*, 96 U.S. 619, 626 (1877); *Southern Pac. Co. v. Smith*, 83 F.2d 451, 452 (9th Cir. 1936); *American Ry. Express Co. v. Crabtree*, 271 F. 287, 288 (6th Cir. 1921); *Aetna Indem. Co. v. J.R. Crowe Coal & Mining Co.*, 154 F. 545, 558 (8th Cir. 1907); *Harper & Reynolds Co. v. Wilgus*, 56 F. 587, 589 (9th Cir. 1893). In evaluating the overall award, a court must consider the verdict form along with the instructions. *See Gallick*, 372

U.S. at 121; *Hickson Corp. v. Norfolk So. Ry. Co.*, 260 F.3d 559, 568 (6th Cir. 2001) ("The instructions and the verdict form should be considered together to determine whether they *presented the issues to the jury in a clear and fair manner.*").

The instructions in this case directed the jury to award damages caused *only* by the railroad's negligence and not to include in that award any amount for a pre-existing condition. Appendix H at 41a-42a, 50a, 52a, 54a-55a (Instructions 5, 24, 28, & 33). Assuming, as courts must, that the jury followed the instructions given, then it must follow that the answer to Question 6 did not include a finding pertaining to "damages" caused by a "pre-existing condition." Fairly interpreted, the answer to Question 8 can be explained either as consistent with the finding in Question 6 or immaterial as a finding necessarily subsumed in the ultimate fact determination made in answer to Question 6.

Additionally, while Question 6 instructed the jury to provide a general damage award "without any reduction for any negligence which you may find on the Plaintiff's part . . .," it did not instruct the jury to answer without any reduction for *pre-existing conditions*. This, taken in combination with the fact that Questions 7 and 8 asked the jury to allocate a percentage of Petitioner's condition to a pre-existing condition following Question 6's award of damages for the railroad's negligence, would lead a reasonable juror to understand that Questions 7 and 8 merely sought clarification of the jury's thought process in arriving at the $800,000 award.

In *Hager v. Norfolk & Western R. Co.*, 2006 WL 3634373 (Ohio 2006), the court dealt with a jury's interrogatory answer allocating 60% of the plaintiff's lung problems to a pre-existing condition. The court readily concluded that there was no inconsistency with the jury's damage assessment: "[R]eading the interrogatories in conjunction with the trial court's instructions, it appears the jury deducted the 60 percent from the verdict. It is presumed the jury followed the

trial court's instructions." *Id.* at *8. Indeed, the very purpose of the special verdict form is to check the jury's general award of damages. *See Hickson Corp.*, 260 F.3d at 568 (stating Illinois law, in a FELA action, regarding use of special interrogatories to check the jury's award of damages involving multiple theories of liability); *Worthy v. Norfolk & Western Ry. Co.*, 619 N.E.2d 1371, 1376 (Ill. App. 1993) (explaining that the function of the special interrogatory is to check the jury's understanding of the case by comparing the verdict to its conclusions as to the ultimate facts).

Finally, asking the jury to attribute a percentage of the damages caused only by the railroad awarded in answer to Question 6 to a cause other than the railroad, as Question 8 did here (Appendix A at 6a), asks the impossible. *See Norfolk Southern R. Co. v. Bradley*, 772 So.2d 1147, 1152 (Ala. 2000) (upholding trial court's refusal to employ interrogatories addressing pre-existing conditions because, "[t]he questions are inconsistent and present an incorrect basis for determining damages.").

II. FELA PERMITS A COURT'S REDUCTION OF A JURY'S DAMAGE AWARD BASED ONLY ON ONE APPORTIONMENT—FOR COMPARATIVE NEGLIGENCE OF THE EMPLOYEE.

In *Ayers*, 538 U.S. 135, this Court clarified the circumstances under which a court may apportion damages in a FELA action. Rejecting the railroad's contention that the trial court erred in instructing the jury not to make a deduction from the general damage award for the contribution of non-railroad asbestos exposures, the Court unanimously held that "FELA does not authorize apportionment of damages between railroad and non-railroad causes." *Id.* at 159-160. Based on the "statutory context" and the remedial nature of the Act, the Court observed that:

> [S]everal of the FELA's provisions expand a railroad's liability by abolishing common-law defenses that limited

> employees' ability to recover against their employers. Among the innovations, the Act expressly directs apportionment of responsibility between employer and employee based on comparative fault. The statute *expressly prescribes no other apportionment.*
>
> Essentially, then, Norfolk asks us to narrow employer liability without a textual warrant. Reining in employer liability as Norfolk proposes, however, is both *unprovided for by the language of the FELA* and *inconsistent with the Act's overall recovery facilitating thrust.* Accordingly, we find Norfolk's plea an untenable reading of the congressional silence.

Id. at 161 (emphasis added; internal citations omitted). The Court noted that the railroad's view "runs counter to a century of FELA jurisprudence. No FELA decision made by this Court so much as hints that the statute mandates apportionment of damages among potentially liable tortfeasors." *Id.* Further, the Court recognized the "paucity of lower court authority for the proposition that the FELA contemplates apportionment" and that the railroad cited "only one FELA decision supporting its position,"—a "reed too slim" to warrant the requested relief. *Id.* at 162-163. The Court also contemplated the adverse consequences that would ensue if the railroad's position were adopted: "[R]eading the FELA to require apportionment would handicap plaintiffs and could vastly complicate adjudications. . . ." *Id.* at 165.

As the Court found in *Ayers*, 538 U.S. at 161, there is no "textual warrant" in FELA to justify a narrowing of employer liability as sanctioned by the Colorado Court of Appeals in this case. Nowhere does the language of FELA allow for a court to apportion a part of damages awarded by a jury to pre-existing conditions. That function is solely the province of the jury. Borrowing from *Ayers*, petitioner observes that no Supreme Court jurisprudence so much as "hints" that what the trial court did and the Court of Appeals sanctioned is permissible under FELA.

At the time of FELA's enactment, the only basis allowing a court to reduce damage awards was where they were *clearly excessive* in light of pre-existing conditions that would have caused some of the damages complained of even in the absence of the defendant's negligence.[7] *See, e.g., Pomroy v. Bangor & Aroostook R. Co.*, 67 A. 561, 563 (Me. 1907).

Moreover, as was the case with the apportionment sought in *Ayers*, acceptance here of the trial court's tendering of the pre-existing condition questions to the jury and its subsequent double reduction of the general verdict in reliance on the answers to those questions is "inconsistent with the Act's overall recovery facilitating thrust." *Ayers*, 538 U.S. at 161. The Act is liberally construed in favor of injured railway workers, *see Green v. River Terminal Ry. Co.*, 763 F.2d 805, 806 (6th Cir. 1985), and this purpose must be kept in mind when confronting any argument that would restrict an employer's liability. *See Baker v. Baltimore & Ohio R. Co.*, 502 F.2d 638, 641 (6th Cir. 1974). The result of the Court of Appeals' opinion in this case is to benefit respondent (and penalize petitioner) twice: once when the jury reduced damages in calculating the general award, and a second time when the trial court reduced the general verdict by the percentage answered in response to Question 8. This is totally inconsistent with FELA's remedial purposes.

Respondent, like the petitioner in *Ayers*, cited to sparse caselaw in support of its position in the Court of Appeals, relying principally on *Sauer v. Burlington N. R.R.*, 106 F.3d 1490 (10th Cir. 1996). *Sauer*, however, is neither controlling nor persuasive given its material distinctions. There, the pre-

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[7] Remittitur, however, bears no resemblance to the instant case, where the *court*, after trial, reduced the jury's general verdict not because the damage award was excessive, but based on the jury's answer to a superfluous question, upon which the court felt compelled to reduce the damages awarded despite the fact that the pre-existing condition was already accounted for by the jury per the court's charge.

existing condition question was not at issue on appeal. *Id.* at 1495. Further, the interrogatory referenced in *Sauer* differs from that involved in this proceeding in a most significant way: it asked, "What percentage of the *damages* [not "condition"] determined in Question No. 5 above are attributable to a *pre-existing condition* or to the Plaintiff's previous or subsequent accidents?" Appendix I at 58a (*Sauer*, Special Verdict Form One) (emphasis added). In contrast to the question asked below, the *Sauer* question clearly requested an apportionment of "damages" out of the general damage award. *Id.* The interrogatory in the instant action inquired only as to what percentage of Plaintiff's "*condition*" was attributable to a "*pre-existing condition.*" Appendix A at 6a (Special Verdict Form B, Question 8). When read in conjunction with the instructions forbidding the jury from awarding any damages not attributable to the defendant's negligence in this case, Appendix H at 52a (Instruction 28), it must be concluded that the jury's general damage award reflected consideration of pre-existing conditions in answer to Question 6.

Finally, as the *Ayers* Court found with regard to apportionment of fault to non-party causes, the decision affirming the trial court's use of this interrogatory and its subsequent reduction of the general verdict based on the jury's answer "would handicap plaintiffs and could vastly complicate adjudications. . ." under FELA. *Ayers*, 538 U.S. at 165.

III. THE DECISION BELOW CONFLICTS WITH OTHER STATE COURTS ON THE USE OF AND EFFECT TO BE GIVEN SPECIAL INTERROGATORIES ADDRESSING PRE-EXISTING CONDITIONS IN FELA ACTIONS.

The Court of Appeals' decision creates a split regarding the use and effect of special interrogatories addressing pre-existing conditions in the trial of FELA actions. The outcome

of this case, if allowed to stand, will engender inevitable inequities between FELA plaintiffs who litigate in different jurisdictions. If Mr. Nichols' case now were to be tried in Ohio, Alabama, or Illinois, as discussed below, his verdict would have been $560,000, rather than the twice-reduced award of $168,000 that he received for his permanently and totally disabling injuries. The result below defeats a core purpose of FELA—to create a uniform body of federal law to govern injury actions between railroad workers and their railroad employers, regardless of their location. *See Dice*, 342 U.S. at 361.

Alabama and Illinois state courts have held that the use of pre-existing condition interrogatories in FELA actions, nearly identical to those at issue in this dispute, is impermissible because they address no ultimate issue of fact and can only serve to create confusion with the jury. *See Norfolk Southern R. Co. v. Bradley*, 772 So.2d 1147, 1152 (Ala. 2000) (upholding trial court's refusal to submit special interrogatory addressing pre-existing conditions in FELA action because "[t]he questions are inconsistent and present an incorrect basis for determining damages. The questions would have asked the jury to determine the amount of damages [plaintiff] was entitled to based on the on-the-job accident and then to assign a percentage of those damages as being attributable to another accident or medical condition."); *Worthy v. Norfolk and Western Ry. Co.*, 619 N.E.2d 1371, 1376 (Ill. App. 1993) (upholding trial court's refusal to employ special interrogatories in FELA action addressing pre-existing conditions because, "While at first glance the special interrogatories appear to relate to the issue of aggravation, taken as a whole they relate to the issue of the reduction of damages," which is not a question of ultimate fact "upon which the rights of the parties directly depend. . . ."; thus, interrogatories were not in "proper form.").

The Ohio Supreme Court has held that, even if questions of the type at issue here are used, answers to them may not form the basis to reduce a FELA verdict. In *Hager v. Norfolk & Western R. Co.*, 2006 WL 3634373, *8 (Ohio 2006), the court declined to overturn the trial court's refusal to reduce the jury's general verdict in a FELA action by the jury's answer to a special interrogatory regarding pre-existing conditions. The court concluded that "reading the interrogatories in conjunction with the trial court's instructions, it appears the jury deducted the 60 percent from the verdict. It is presumed the jury followed the trial court's instructions." *Id.*

On the other hand, there is the decision below which approved the use of pre-existing condition interrogatories nearly identical to those involved in the above cases, and further held that the trial court, contrary to the terms of FELA and this Court's governing precedent, may reduce the jury's award of damages caused only by the negligence of the railroad based on the jury's responses to those questions. *Nichols* has already been cited by several treatises for this proposition. *See* Jacob A. Stein, *Stein on Personal Injury Damages*, § 11:15 (3rd ed. 2007); Sheila K. Hyatt and Stephen A. Hess, *Rule 59. Motions for Post-Trial Relief*, 5 Colorado Practice Series, Civil Rules Annotated, R 59 (4th ed., West's 2006).[8]

While it is too early to know through published opinions just how frequently railroads are citing to *Nichols* and *Sauer* in FELA pre-existing injury cases to support the use of such

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[8] The questions asking for allocation between a claimant's "condition" and a "pre-existing condition" are so fraught with mischief in terms of confusing the jury, interjecting needless complication, inviting perceived inconsistency and argument as to non-essential issues, that this Court should consider condemning any further use of questions of this type in FELA cases. As even the court below noted, the verdict form, when viewed against the instructions, is not a "model for future use. . . ." Appendix B at 14a.

interrogatories, there can be little doubt that the number is significant and will continue to grow until this Court spells out how pre-existing condition questions in FELA trials must be treated.

CONCLUSION

For the reasons set forth above, petitioner respectfully requests that his petition for writ of certiorari to the Colorado Court of Appeals be granted.

Respectfully submitted,

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